Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOSEPH E. BOYETT,
Petitioner,

v.

TROY STATE UNIVERSITY AT MONTGOMERY (TSUM); DR. JACK HAWKINS, JR., individually and as Chancellor of the Troy State University System; DR. GLENDA MCGAHA-CURRY, individually and as president of TSUM; DR. LIVINGSTON ALEXANDER, individually and as Vice President for Academic Affairs of TSUM; DR. MATTHEW MARIANO, individually and as Interim Dean of Computer & Information Science and Mathematics Division,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether statements made by a university professor seeking university funds for his division address a matter of public concern which then subjects it to a balancing of interests test set forth in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)?

2. Whether the right to petition a governmental unit, a university, for a redress of grievances as set forth in the First Amendment, is dependent upon the content, form, and context of that grievance?

3. Whether a property right exists in the right of access to state administrative adjudicatory processes under *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)?

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b), Petitioner represents to this Honorable Court that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioner, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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OCTOBER TERM, 1998

No. ———

JOSEPH E. BOYETT,

Petitioner,

v.

TROY STATE UNIVERSITY AT MONTGOMERY (TSUM); DR. JACK HAWKINS, JR., individually and as Chancellor of the Troy State University System; DR. GLENDA MCGAHA-CURRY, individually and as president of TSUM; DR. LIVINGSTON ALEXANDER, individually and as Vice President for Academic Affairs of TSUM; DR. MATTHEW MARIANO, individually and as Interim Dean of Computer & Information Science and Mathematics Division,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit was entered on April 14, 1998 (App. 1a) and the order denying rehearing and rehearing en banc was entered on July 31, 1998 (App. 30a). The published decision of the United States Court for the Middle District of Alabama was entered on July 9, 1997 (App. 7a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated April 14, 1998 and rehearing en banc decision is dated July 31, 1998.

The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1). Rule 10 of the Supreme Court Rules provides for review of a court of appeals decision when "(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[,]" or "(c) has decided an important federal question in a way that conflicts with relevant decisions of this Court."

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

The Plaintiff, Dr. Joseph E. Boyett, filed his complaint in the Circuit Court of Montgomery County, Alabama on July 11, 1996, alleging violations of procedural due process, free speech, substantive due process and age discrimination. The complaint was filed against his employer, Troy State University at Montgomery ("TSUM"); Dr. Jack Hawkins, Jr. (Chancellor of the TSU System); Dr. Glenda McGaha-Curry (TSUM's President); Dr. Livingston Alexander (TSUM's Academic Vice President); and Dr. Matthew Mariano (a TSUM faculty professor who served as an Interim Dean of TSUM's Computer & Information Science and Mathematics Division ("CIS/Math")).

The Defendants filed notice in the Circuit Court of Montgomery County, Alabama of removal to federal court pursuant to 28 U.S.C. § 1441 on August 6, 1996. On that same day, the Defendants filed an answer to the complaint. On April 21, 1997, the Defendants submitted a

motion for partial summary judgment and briefs and materials in support thereof. On May 15, 1997, the Plaintiff filed his responsive material pursuant to Rule 56, Fed. R. Civ. P.

The trial court granted summary judgment in favor of all Defendants on the constitutional claims and in favor of the individual Defendants on the age discrimination claim on July 9, 1997. The trial court allowed the case to proceed to trial on the age discrimination claim against TSUM only. Only July 29, 1997, the jury returned a verdict for TSUM.

On August 29, 1997, the Plaintiff filed notice of appeal to the Eleventh Circuit Court of Appeals from the trial court's entry of summary judgment in favor of the Defendants on July 9, 1997. Basis of jurisdiction in the court of appeals was 28 U.S.C. § 1291. On appeal, the Plaintiff only challenged the summary judgment against him on the First Amendment and procedural due process claims. Following briefs on the issues, the appellate court entered a per curiam opinion on April 14, 1998 affirming the trial court. Subsequently, on July 31, 1998, the Eleventh Circuit denied the Plaintiff's Petition for Rehearing/Suggestion on Hearing En Banc.

B. Statement of the Facts.[1]

The Plaintiff, Dr. Joseph E. Boyett, began his employment with TSUM in September of 1990 as an Associate Professor in the Computer & Information Science/Mathematics Department ("CIS/Math"). The Plaintiff also served as Dean of the CIS division for a period of time. During the time that he was employed with TSUM, the Plaintiff was offered successive one-year contracts. The last contract that he had with TSUM ended on August 31, 1996.

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[1] This statement of the facts will consist substantially of a verbatim repetition of the trial court's recitation of them in its memorandum opinion entered by that court on July 9, 1997. (App. 9a).

In January of 1995, the Plaintiff announced that he was resigning as Dean of the CIS division. He was informed in June of 1995 that Defendant Dr. Matthew Mariano had been asked to assume the position of Dean in September of 1995. During the time of the Plaintiff's tenure at TSUM, he made statements within the university system regarding additional funds for his CIS division, statements in regard to faculty review and evaluation, and statements in regard to election procedures used for the university's Graduate Council, coupled with a formal grievance filed with TSUM pertaining to the election procedure used by the Graduate Council. Because of these statements and action taken by the Plaintiff, the Plaintiff alleged that the Defendants retaliated against him, resulting in the denial of his reappointment to TSUM.

On December 12, 1995, Defendant Dr. Livingston Alexander, Vice President of Academic Affairs at TSUM, recommended to Defendant Dr. Glenda McGaha-Curry, President of TSUM, that the university not renew the Plaintiff's appointment. Defendant Alexander later met with the Plaintiff and told him that his contract would not be renewed. The Plaintiff then filed a formal grievance alleging that TSUM had no legitimate reason to deny him an appointment and that he had been denied due process prior to his termination. Later, the Plaintiff filed a lawsuit against TSUM and the aforementioned faculty members.

REASONS FOR GRANTING THE PETITION

I. PLAINTIFF'S STATEMENTS SEEKING UNIVERSITY FUNDS FOR THE "CIS" DIVISION.

The district court in its memorandum opinion held that the Plaintiff's comments seeking funding for his division did not address a matter of public concern; as such, the court determined that the Plaintiff's comments were not protected by the First Amendment. In making its determination, the trial court applied the content, form, and

context test laid down in *Connick v. Myers*, 461 U.S. 138, 147-148, 75 L.Ed.2d 708, 720, 103 S.Ct. 1684, 1690 (1983). The circuit court of appeals likewise concluded in its opinion that the Plaintiff's statements did not address a matter of public concern. Both the trial court and the circuit court of appeals characterized the Plaintiff's statements as a matter concerning the internal administration of the university.

The content of some of the Plaintiff's statements to university officials centered around funding for his division. In fact, the Plaintiff acted as spokesperson for his division when he discussed funding matters with the university officials. Statements involving how public funds should be allocated in an educational institution address matters of public concern. In *Pickering v. Board of Educ.*, 391 U.S. 563, 571-572, 20 L.Ed.2d 811, 819, 88 S.Ct. 1731, 1736 (1968), the Court stated that "the question whether a school system requires additional funds is a matter of legitimate public concern . . . ." Furthermore, the Court noted that teachers are uniquely qualified to express views regarding how public funds should be allocated to the operation of schools, a view which should be expressed "freely . . . without fear of retaliatory dismissal." *Id.*

The Plaintiff's statements pertaining to how the university should allocate funds to his division likewise address a matter of public concern. The fact that the Plaintiff's statements occurred in a university setting and among university officials does not lessen the content's importance to the public. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 413, 58 L.Ed.2d 619, 623, 99 S.Ct. 693, 695 (1979). Also, the fact that the Plaintiff's statements may have been motivated in part by his personal feelings concerning funding for his division does not detract from their protected status. *Lewis v. Blackburn*, 734 F.2d 1000, 1006 (4th Cir. 1984).

Some statements made by the Plaintiff regarding university funding for his division took the form of remarks

made by him to the university's Council of Deans. The Council of Deans would listen to the budgetary requests of each department spokesperson and would then vote on the priority of each request. As spokesperson for his division, the Plaintiff brought forth and discussed his views for funding his division as well as the collective views of his colleagues whom he represented. The Plaintiff performed the function of a representative for his division, not merely an employee voicing his personal preferences for his division.

Finally, the context in which the Plaintiff's statements were made to the university officials was that of a divisional spokesperson advocating his colleagues' views on the amount of funding needed by that division to effectively carry out its mission of research and instruction. Though the trial court and the circuit court of appeals characterized the Plaintiff's statements as remarks involving internal administrative matters, the manner in which public funds are allocated to an educational entity, whether directly to a university or through it to a division thereof, does not lessen the public's interest. Generally, the quality of education is tied to the level of funding allocated to it. In this regard, despite the trial court's contention in its memorandum opinion, there is an important derivative impact tied to the level of funding given to a university division that is of a public concern, for the ability of a division to hire and retain qualified educators, purchase needed equipment, and conduct necessary research, all impact upon the quality of education delivered to the public through its students.

The Plaintiff's statements, when viewed from their content, form, and context, address a matter of public concern; consequently, the trial court and the circuit court of appeals erred in holding otherwise.

II. PLAINTIFF'S RIGHT TO PETITION A UNIVERSITY FOR THE REDRESS OF GRIEVANCES.

The trial court in its memorandum opinion stated that, since the Plaintiff's right to petition claim did not address a matter of public concern, the Defendants were entitled to summary judgment. The trial court erred in that holding, for the right to petition the government for a redress of grievances is a fundamental right separate and distinct from the right to free speech, both of which are contained in the First Amendment.[2] In the Declaration of Independence, the right to petition for redress of grievance is also noted: "In every state of these Oppressions we have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury." The Declaration of Independence para. 1 (U.S. 1776).

In *DeJonge v. Oregon,* 299 U.S. 353, 364, 81 L.Ed. 278, 284, 57 S.Ct. 255, 260 (1937), the Court implicitly noted that the right to petition the government for a redress of grievances is a fundamental right separate and distinct from the rights of free speech and free press, or the right to peaceable assembly. Though the trial court cited *Renfroe v. Kirkpatrick,* 722 F.2d 714 (11th Cir. 1984), in its memorandum opinion for the proposition that a grievance petition filed by a teacher is *not* protected unless it addresses a matter of public concern, the *Renfroe* case merely cited *Connick v. Myers,* 461 U.S. 138, 147-148, 75 L.Ed. 2d 708, 720, 103 S.Ct. 1684, 1690 (1983) for the premise that the content, form, and context of a grievance statement will determine whether it addresses a matter of public concern. *Id.* at 715. The *Renfroe* case does not directly address the issue of whether

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[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. Const., Amend. I.

the fundamental right to petition a government for a redress of grievances is dependent upon the content, form, and context of that grievance statement. It is the Plaintiff's position that the right to petition a government for a redress of grievances is not dependent upon the content, form, and context of the grievance itself, for the right stands on its own, separate and distinct from the grievance contained in that right.

The holding in *Renfroe* conflicts with the Third Circuit's decision in *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994). That court, citing numerous Supreme Court precedents regarding the importance of the age-old doctrine of free access to the judicial (or quasi-judicial) process, held that the right to petition for redress of grievances is protected by the Constitution even where said petition concerns only private matters. *Id.* 434-43. The Court went on to find:

> when government—federal or state—formally adopts a mechanism for redress of those grievances for which government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious "petition" invoking that mechanism may be disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its constitutional imprimatur.

Id. at 442. *San Filippo* also cautioned that "[t]he petition clause of the first amendment was not intended to be a dead letter—or graceful but redundant appendage of the clauses guaranteeing freedom of speech and press." *Id.*

Although the First Amendment right to petition has not yet received exhaustive treatment by this Court, it is established that it "[is] among the most precious of the liberties safeguarded by the Bill of Rights." (*United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217,

222 [1967]), and that, while access to the courts is guaranteed by it, the right also protects access to governmental agencies in the executive branch. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The only significant limitation previously placed upon the right to petition by this Court appears to exclude claims that lack any reasonable basis. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983). In *McDonald v. Smith*, 472 U.S. 479, 485 (1985), the Court did not address the issue of whether the content, form, and context of grievances were to be considered in the petition cases, but it did assert that "[t]hese First Amendment rights are inseparable, . . . and there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions."

The *McDonald* Court was considering a question of whether absolute immunity from damages for libel extended to statements made in a petition, and was not addressing the issue of whether a petitioner's rights extended to matters of private concern. The Seventh Circuit in *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261 (7th Cir. 1988), relied heavily on the quoted *McDonald* language, however, to support its holding that the right to petition was limited to seeking redress over matters of public concern.

The Fifth, Sixth, and Seventh Circuit Courts of Appeals are apparently joined by the Eleventh Circuit in holding that the right to petition can only be asserted when the subject matter of the petition involves a matter of public concern. See *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989); *Valot v. Southeast Local School Dist. Bd. of Educ.*, 107 F.3d 1220, 1226 (6th Cir. 1997); *Auriemma v. Rice*, 895 F.2d 338, 347 (7th Cir. 1990); *Gray v. Lacke*, 885 F.2d 399, 412 (7th Cir. 1989); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-62 (7th Cir. 1988).

On the other hand, the Third Circuit's rationale in *San Filippo* seems to be arguably supported by the Ninth and Tenth Circuits. See *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (retaliatory action because of filing of a law suit is unconstitutional); *Morfin v. Albuquerque Public Schools*, 906 F.2d 1434, 1439 (10th Cir. 1990) (a teacher cannot be sanctioned for associating with a union and bringing a grievance).

The need for the Court to address this issue is accentuated by the reluctance of the lower courts to recognize the existence of a matter of public concern. See, e.g., *Auriemma*, 895 F.2d at 347 (even a reverse discrimination suit by a white policeman is not a matter of public concern). *Gray*, 885 F.2d at 411 (complaint to supervisors in order to have sexual harassment stopped is not a matter of public concern.)

It could border on the catastrophic for governmental agencies to encourage their employees to file grievances, and then discharge them for doing so. In *Heckler v. Community Health Service*, 467 U.S. 51, 61 n.13 (1984), the Court quoted *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970), as follow: "To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Heckler* also quotes *Menges v. Dentler*, 33 Pa. 495, 500 (1859) as saying "[m]en naturally trust in their government, and ought to do so, and they ought not to suffer for it." *Id.*

There is a clear conflict among the circuits as to whether the petition clause may be invoked irrespective of its content, form, and context—an issue that clearly needs resolving by this Court.

III. A PROPERTY RIGHT EXISTS IN THE RIGHT OF ACCESS TO STATE ADMINISTRATIVE ADJUDICATORY PROCESSES.

In the instant case, Boyett claims a right to procedural due process rising out of the terms of the TSUM Faculty

Handbook, a right contained in the Due Process Clause of the Fourteenth Amendment.[3] See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). While an employee-at-will has no property right to procedural due process, the creation of a "for cause" standard for termination gives rise to federally mandated rights to procedural due process. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Barnett v. Housing Authority of City of Atlanta*, 707 F.2d 1571 (11th Cir. 1983). As the Tenth Circuit stated, in interpreting *Roth*.

> [T]he Supreme Court explained that a public employee may acquire a constitutionally protected property right in continued employment. Such a property right derives from the employee's legitimate claim of entitlement to continued employment, which arises from independent sources such as state laws, rules or understandings that secure benefits to employees.

Calhoun v. Gaines, 982 F.2d 1470, 1473-74 (10th Cir. 1992).

In affirming the trial court in the instant case, the panel of the Eleventh Circuit stated that "[a] right to process is not a property right." *Boyett v. TSUM*, Slip Op. 97-6691, p. 5 (April 14, 1998) (App. 4a). However, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), this Court held that, once a state establishes an avenue for relief from an alleged wrong, the right of access to that avenue is guaranteed by the due process clause. In *Logan*, the plaintiff was, through the inaction of a state agency, denied any available avenue for relief for the denial of

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[3] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend XIV, § 1.

future public benefits. As in the instant case, the plaintiff there had no constitutionally protected interest in receiving the government benefits; however, this Court held that access to the machinery by which the decision was to be made was such a protected interest. In this case, the process which Boyett sought was simplicity in itself: the Plaintiff merely requested that the university officials provide him with some legitimate, non-discriminatory reason why they chose to terminate him. However, not until this lawsuit was filed did any TSUM administrator provide any reason for their action—a reason unsupported by the testimony of any disinterested party.

The TSUM Faculty Handbook, in two instances, explicitly provided that a faculty member is entitled to "due process." The handbook provides, in Section 3.9.2, procedures for resolving "grievances." In subsection 3.9.2.E(1), it defines a grievance as being inclusive of "due process" regarding the non-renewal of a faculty contract. Section 3.7.1 is also directly on point. That section provides that the Dean and Vice-Preident for Academic Affairs have "wide latitude" in decisions regarding non-reappointment of non-tenured faculty; however, this latitude is specifically tempered by "due process."

Informal processes may create a property right in continued employment. See *Blankenbaker v. McCook Public Power Dist.*, 940 F.2d 384 (8th Cir. 1991) (Employer agreement); *McLaurin v. Fischer*, 768 F.2d 98 (6th Cir. 1985) (Tradition of "permanent" status). The Eleventh Circuit has held that an employee handbook may create this right. *Nicholson v. Gant*, 816 F.2d 591 (11th Cir. 1987). However, in the instant case, we need not even reach whether there is an implicit creation of a property right. Here, the TSUM Faculty Handbook clearly states that non-renewal must comply with "due process."

Once a property interest is created by contract or by state law, what process is due becomes a matter of federal

law. In *Armstrong v. Manzo*, 380 U.S. 545 (1965), this Court stated, "A fundamental requirement of due process is 'the opportunity to be heard'" *Id.* at 552 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394). We have a long and successful history in this nation in our experience with procedural due process. It is one of the most important principles that distinguishes us from the baseness exhibited by the governments of many other present and former countries. Justice Frankfurter once said: "The history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Separate opinion).

CONCLUSION

For all the foregoing reasons, the Appellant Boyett respectfully requests that this Honorable Court grant a petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals, reverse the decision of the trial court, and remand this case to the court for the trial of these issues.

Respectfully submitted,

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Dated: October —, 1998

APPENDICES

APPENDICES

APPENDIX A

[Filed April 14, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6691

Non-Argument Calendar

D.C. Docket No. CV-96-A-1222-N

JOSEPH E. BOYETT, DR.,
Plaintiff-Appellant,

versus

TROY STATE UNIVERSITY AT MONTGOMERY (TSUM); JACK HAWKINS, JR., Dr., individually and as Chancellor of the Troy State University System, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

April 14, 1998

Before COX, BLACK and HULL, Circuit Judges.

PER CURIAM:

Joseph E. Boyett appeals following partial summary judgment and judgment on a jury verdict against him on his claims against Troy State University at Montgomery (TSUM) and three of its administrators. We affirm.

Boyett was a nontenured faculty member in the University's Computer Information Sciences/Mathematics (CIS/Math) Division. He taught at the University from 1990 to 1996 under a series of one-year contracts, in 1996 his contract was not renewed. By many accounts, he had a stormy sojourn at TSUM, especially during a period in which he served as dean of the Division. The deposition testimony indicated that he was particularly adept at rubbing his superiors the wrong way: TSUM's president considered him impossible to work with; according to the vice president of academic affairs, the only "style that Dr. Boyett knows . . . is to be belligerent and loud, argumentative, especially when there is a hidden agenda." (R. 1-12 Ex. F at 52) Boyett points to three instances of speech in particular during his employment that he believes resulted in nonrenewal of his contract: his advocacy of greater resources for the CIS/Math Division; his poor evaluation of a professor in the Division; and his criticism of the method of electing members of the University's Graduate Council.[1]

After his last contract expired, Boyett sued the University, its president, its vice president of academic affairs, and the dean of the CIS/Math Division on claims of denial of procedural and substantive due process, retaliation for exercise of free speech, and age discrimination in violation of the Age Discrimination in Employment Act. The district court granted the defendants summary judgment on all the constitutional claims. The ADEA claim went to trial, and Boyett lost. On appeal, Boyett challenges only the summary judgment against him on his First Amendment and procedural due process claims. Our review is de novo. See Deremo v. Watkins, 939 F.2d 908, 910 (11th Cir. 1991); Warren v. Crawford, 927

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[1] These are the statements mentioned in the Complaint; others have been advanced since, but because Boyett never sought to amend the Complaint, we do not take this additional speech into consideration.

F.2d 559, 561 (11th Cir. 1991). We reject the challenges.

Boyett's First Amendment retaliation claim is short one element: no speech that he claims motivated his nonrenewal is a matter of public concern. See Connick v. Myers, 461 U.S. 138, 146-47, 103 S.Ct. 1684, 1689-90 (1983). Boyett's speech as described above is unlike that in any case he cites because it did not accuse his employer of wrongdoing or ineptitude, cf. Bernheim v. Litt, 79 F.3d 318, 325 (2d Cir. 1996) (employee made public an administrator's misrepresentations about student test scores); Kincaid v. City of Blue Springs, Mo., 64 F.3d 389, 397 (8th Cir. 1995) (city engineer accused city government of paying contractors for construction of dam that would likely fail, causing damage and injury); Lambert v. Richard, 59 F.3d 134, 136 (9th Cir. 1995) (employee spoke at public meeting about total breakdown of city library services); nor did it express his position on a matter of public debate or election, cf. Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1506 (11th Cir. 1990) (employee objected to employer's pressure for him to vote a certain way on a referendum); nor did it raise any broad policy concern before an extra-academic audience, cf. Johnson v. Lincoln Univ. of Commonwealth Sys. of Higher Educ., 776 F.2d 443, 452 (3rd Cir. 1985) (speech including letters to high state officials and oversight agencies complaining of low academic standards). Rather, Boyett's speech resembles more closely the sort of complaints about internal administrative matters that courts have found not to be of public concern. See, e.g., Bunger v. University of Okla. Bd. of Regents, 95 F.3d 987, 992 (10th Cir. 1996) (complaints about composition of Graduate Council); Dorsett v. Board of Trustees for State Colleges & Univs., 940 F.2d 121, 124 (5th Cir. 1991) (complaints about professor overload); Ferrara v. Mills, 781 F.2d 1508, 1515 (11th Cir. 1986) (criticism of school class assignments and of permitting students to choose courses and teachers).

The district court likewise correctly concluded that Boyett's procedural due process claim is fatally missing the elements of a due process claim: a property interest. *See* Brett v. Jefferson County Bd. of Educ., 123 F.3d 1429, 1433 (11th Cir. 1997). The Handbook makes clear that untenured faculty serve at the pleasure of the Dean and the Vice President for Academic Affairs. Boyett protests to the contrary that the Handbook implicitly giveth what it expressly taketh away: it says that the Dean and Vice President will exercise their prerogatives "consistent with academic freedom and due process," (R. 1-12 Ex. D at 31), and it provides a grievance procedure. This statement and the Handbook's provision of a grievance process do not provide a property right to employment. A right to process is not a property right. See Villanova v. Abrams, 972 F.2d 792, 798 (7th Cir. 1992); Harris v. Birmingham Bd. of Educ., 817 F.2d 1525, 1527 (11th Cir. 1987). The Handbook may afford Boyett a right to process, but it does not provide Boyett a constitutional due process right.

For these reasons, the district court's judgment is affirmed.

AFFIRMED.

[Filed April 14, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6691

Non-Argument Calendar

D.C. Docket No. CV-96-A-1222

JOSEPH E. BOYETT, DR.,
Plaintiff-Appellant,

versus

TROY STATE UNIVERSITY AT MONTGOMERY (TSUM); JACK HAWKINS, JR., Dr., individually and as Chancellor of the Troy State University System, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

Before COX, BLACK and HULL, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 14, 1998

For the Court:

THOMAS K. KAHN
Clerk

By:/s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 08/10/98

APPENDIX B

[Filed July 9, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 96-A-1222-N

DR. JOSEPH E. BOYETT,
Plaintiff,

VS.

TROY STATE UNIVERSITY AT MONTGOMERY; *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This cause is before the court on a Motion for Partial Summary Judgment filed by Troy State University at Montgomery ("TSUM") and by Dr. Jack Hawkins ("Hawkins"), Dr. Glenda McGaha-Curry ("Curry"), Dr. Livingston Alexander ("Alexander"), and Dr. Matthew Mariano ("Mariano"), in their individual and official capacities (collectively "Defendants").

The Plaintiff, Dr. Joseph E. Boyett ("Plaintiff") originally filed a Complaint in the Circuit Court of Montgomery County on July 11, 1996. The Plaintiff brought four counts against the Defendants alleging that they violated the Plaintiff's right of due process of law under the Fourteenth Amendment to the United States Constitution and the Alabama Constitution of 1901, of Free Speech under the First Amendment to the United States Constitution and the Alabama Constitution of 1901, of sub-

stantive due proces under the Fourteenth Amendment to the United States Constitution and the Alabama Constitution of 1901, and that the Defendants violated the Age Discrimination in Employment Act ("ADEA") 29 U.S.C. § 621 et seq.[1]

The Defendants filed a Notice of Removal in this court on August 6, 1996. The Defendants subsequently filed a Motion for Partial Summary Judgment on April 21, 1997.

For the reasons to be discussed, the Defendants' Motion for Partial Summary Judgment is due to be GRANTED.

II. SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the district court that the nonmoving party has failed to present evidence in support of some element of its case on

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[1] The Defendants have not moved for summary judgment on the ADEA claim as against TSUM. The Plaintiff concedes that to the extent that any ADEA claim was alleged against the individual defendants, they are entitled to summary judgment on the ADEA claim. Plaintiff's Brief in Response to the Motion for Partial Summary Judgment, page 7.

which it bears the ultimate burden of proof. *Id.* at 322-324.

Once the moving party has met its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. To avoid summary judgment, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). On the other hand, the evidence of the nonmovant must be believed and all justifiable inferences must be drawn in its favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

After the nonmoving party has responded to the motion for summary judgment, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

III. FACTS

The submissions of the parties establish the following facts:

The Plaintiff started his employment with TSUM in September of 1990 as an Associate Professor in the Computer Information Sciences/Mathematics Department ("CIS/Math"). The Plaintiff also served as Dean of the CIS division for a period of time. During the time that he was employed with TSUM, the Plaintiff was offered successive one year contracts. The last contract he had with TSUM ended on August 31, 1996.

In January of 1995, the Plaintiff announced that he was resigning as Dean of the CIS division. He was informed in June of 1995 that Defendant Mariano had been asked to assume the position of Dean in September of

1995. While the Plaintiff was still acting as Dean of the CIS Division, he gave unfavorable reviews of Defendant Mariano's performance in teaching. The Plaintiff alleges that during his tenure with TSUM he spoke on matters of purported public concern including comments in an attempt to gain additional funds for his division, comments in connection with faculty review and evaluation, and comments on election procedures used for the Graduate Council, and other matters. The Plaintiff alleges that the Defendants retaliated against him for these comments by taking action which resulted in denial of his reappointment to TSUM.

On December 12, 1995, Defendant Alexander, Vice President of Academic Affairs at TSUM, recommended to Defendant Curry, President of TSUM, that the University not renew the Plaintiff's appointment. Defendant Alexander subsequently met with the Plaintiff and advised him that his contract would not be renewed. The Plaintiff filed a grievance alleging that TSUM did not have a legitimate reason to deny him an appointment and that he had been denied due process.

IV. DISCUSSION

The Plaintiff alleges that the Defendants violated his rights to procedural due process and substantive due process of law under the Fourteenth Amendment and violated the First Amendment of the United States Constitution. When an individual seeks redress in the courts for a violation of his constitutional rights, he may not sue directly under the Constitution, but must make his claim under 42 U.S.C. § 1983.

1. § 1983 Claims Against TSUM

The Defendants argue that the § 1983 claims against TSUM are due to be dismissed because TSUM is immune from suit under the Eleventh Amendment to the Constitution of the United States. The court first notes that a

state is not considered to be a "person" for purposes of § 1983 actions. *Will v. Michigan Department of State Police*, 491 U.S. 58, 70 (1989). TSUM is an instrumentality of the state. *Harden v. Adams*, 760 F.2d 1158 (11th Cir. 1985); *Kelley v. Troy State University*, 923 F. Supp. 1494 (M.D. Ala. 1996). In addition, under the Eleventh Amendment.

> [t]he judicial power of the United States shall not be construed to extend any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

U.S.C. Const. Amend. XI. Where a party attempts to sue a state in federal court, the Eleventh Amendment prohibits the federal court from exercising jurisdiction over the suit, except where the state has consented to be sued or waived its immunity, or where Congress has overridden the state's immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-100 (1984); *Quern v. Jordan*, 440 U.S. 332, 341 (1979). However, neither one of these exceptions applies to the Plaintiff's § 1983 claims against TSUM. Congress has not abrogated Eleventh Amendment immunity in § 1983 cases. *Quern*, 440 U.S. at 345. The State of Alabama also has not waived its immunity. *Free v. Granger*, 887 F.2d 1552, 1557 (11th Cir. 1989). Consequently, the Defendants are entitled to summary judgment on the § 1983 claims against TSUM.

2. § 1983 Claims Against State Officials in Their Official Capacities

The Plaintiff has asserted § 1983 claims against the state officials in their official capacities. Neither a state nor its officials acting in their official capacities are "persons" under § 1983. *Will*, 491 U.S. at 70. State agents in their official capacities, however, may be properly subject to prospective injunctive relief under § 1983 because

such actions are not treated as actions against the State and are not barred by the Eleventh Amendment. *Cross v. Alabama*, 49 F.3d 1490, 1503 (11th Cir. 1995). Therefore, to the extent that the Plaintiff has established a violation of his constitutional rights,[2] the Defendants are entitled to summary judgment on the Plaintiff's § 1983 official capacity claims for compensatory and punitive damages.

3. Claims Against the State Officials in Their Individual Capacities

A plaintiff who sues an individual under § 1983 "seek[s] to impose personal liability upon a government official for actions he takes under color of state law." *Graham*, 473 U.S. at 165. The Plaintiff has brought § 1983 claims against the state officials for Constitutional violations which include alleged deprivations of procedural due process, substantive due process, and the right of free speech under the First Amendment.[3]

a. Procedural Due Process

The Plaintiff has alleged that he was deprived of a property interest and a liberty interest without due process of law. The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property without due process of law. . . ." U.S.C. Const. Amend. 14 § 1. Property inter-

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[2] The merits of the Plaintiff's constitutional claims are addressed infra.

[3] The Plaintiff concedes in his arguments to the court that Defendant Hawkins, Chancellor of the Troy State University System, in [sic] entitled to summary judgment in his individual capacity. Plaintiff's Brief in Response to the Motion for Partial Summary Judgment, page 14. The Defendants also point out that Defendant Mariano cannot be required to provide prospective injunctive relief since he no longer holds the position of Dean. Defendant's Brief in Support of Partial Summary Judgment, page 90.

ests are not created by the Constitution but by existing rules or understandings which stem from an independent source such as state law and arise only where the plaintiff demonstrates a "legitimate claim of entitlement." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

The Plaintiff has stated that the Defendants violated their own personnel policies, apparently arguing that this violation deprived him of due process. The Defendants, however, argue that, even assuming a violation of a personnel policy, such a violation is not itself a constitutional violation. The Eleventh Circuit has explained that merely because a state law procedure exists does not mean that violation of that procedure is a due process violation under the federal constitution. *Harris v. Birmingham Bd. of Ed.*, 817 F.2d 1525, 1528 (11th Cir. 1987); *see also Black v. City of Auburn*, 857 F. Supp. 1540 (M.D. Ala. 1994) ("noncompliance with personnel policies is not a per se denial of procedural due process") *aff'd*, 56 F.3d 1391 (11th Cir. 1995). Instead, this court must determine whether there is a property interest before an inquiry may be conducted into whether the requisite constitutional process was afforded.

The Plaintiff has apparently argued that he had an implicit property right to continued employment. The Plaintiff has provided no evidence to refute the evidence that he was a non-tenured employee who was appointed to successive year contracts. The Supreme Court has explained that where, as here, a contract for employment specifically provides that it is to terminate on a specific date, the terms of the appointment secure no interest in re-employment. *Roth*, 408 U.S. at 577. However, state statutes, rules, regulations, and mutually explicit understandings can also create property interests. *See Bishop v. Wood*, 426 U.S. 341, 345 (1976); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Whether these sources create a property interest must be decided by reference to state law. *Bishop*, 426 U.S. at 344.

The Plaintiff acknowledges that an employee-at-will has no right to procedural due process. However, the Plaintiff has sought to rely on the personnel policies of TSUM to establish that he was not an at-will employee under Alabama law because his reappointment could only be denied "for cause." The Plaintiff explained in deposition that he felt that the personnel policies of TSUM entitled him to continued appointment unless a legitimate reason was given for his nonrenewal. Boyett's Deposition, page 120, lines 10-22. The Plaintiff has pointed to § 3.7.1 of the TSUM Faculty Handbook which lists examples of legitimate reasons for nonreappointment. The Defendants argue, however, that the non-reappointment section cannot be read to confer any right of reappointment since the examples of legitimate reasons for non-reappointment are not an exhaustive list.

The Eleventh Circuit has previously addressed an argument similar to that made by the Plaintiff. *See Blanton v. Griel Memorial Psychiatric Hospital*, 758 F.2d 1540 (11th Cir. 1985). In *Blanton*, the Plaintiff pointed to an Alabama regulation which provided specific reasons for discharge, and argued that the specified reasons were analogous to allowing termination only for cause. *Id.* at 1543. The court rejected the Plaintiff's argument because it found, upon a reading of the regulations in the entirety, that the regulations were clearly designed to offer a lesser expectation of continued employment than that offered to permanent employees. *Id.* at 1543. Similarly, in this case, the Handbook draws a clear distinction between tenured and non-tenured employees. In § 3.7.4, the Faculty Handbook states that tenured employees will be dismissed for cause, while in § 3.7.7, the Faculty Handbook states that a notice of non-reappointment is not a dismissal for cause.[4] *See Lovelace v. Southeastern Massa-*

[4] The Plaintiff states in a footnote that the Faculty Handbook is ambiguous because it uses the phrase "due process" and, therefore, should be construed against the drafter. Apparently, the Plaintiff is arguing that inclusion of the phrase "due process" means that

chusetts Univ., 793 F.2d 419, 422 (1st Cir. 1986) (holding that a statement that recommendations for nonrenewal must be justified does not signify a relinquishment of the university's normal discretion with respect to non-tenured employees). In addition, the reasons for non-reappointment in the TSUM Faculty Handbook are explicitly identified as not being an exhaustive list. *See* Faculty Handbook § 3.7.1 ("Legitimate reasons for nonreappointment may include, but would not necessarily be limited to . . ."). Furthermore, the Faculty Handbook states, in the provision regarding severance of employment within the context of non-reappointment, that "a severance prerogative rests with both parties." Faculty Handbook § 3.7.1. A court in this district has previously reasoned that there is no intent to create a property interest where a handbook provided a list of reasons for dismissal that was not all-inclusive, reserved the right to terminate for non-specified reasons, and reserved the mutual privilege of terminating the employment relationship at any time. *See Kelsey v. Lee County Hospital Bd.*, No. 82-127-E, 1983 WL 14918 (M.D. Ala. December 2, 1983), *aff'd*, 742 F.2d 1465 (11th Cir. 1984). Therefore, the court concludes that the TSUM Faculty Handbook did not create a legitimate expectation that reappointment could be denied only for cause.

The Plaintiff has also sought to rely on other provisions in the Faculty Handbook to establish that he had a property interest in his renewed appointment. The Plaintiff has argued that the court need not determine whether there is an implicit property right in this case because the TSUM Faculty Handbook explicitly states that nonrenewal must comply with "due process." The Plaintiff points to § 3.9.2., which states that a grievance can be

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TSUM intended to create a property interest in re-appointment. However, the court finds that under the *Blanton* requirement that the handbook be read in its entirety, the handbook is not ambiguous, and that TSUM's intent was to distinguish between tenured and appointed employees.

filed for denial of due process in nonrenewal of a contract, and § 3.7.1, which states that the Dean and Vice-President of Academic Affairs have wide latitude with regard to reappointments, consistent with due process. Although the Plaintiff does not explain his argument, it appears that the Plaintiff is arguing that TSUM created a property right by promising to comply with procedures consistent with "due process," and then deprived that right in violation of due process.

The Defendants have pointed to a case analyzing a similar argument which was decided by the Tenth Circuit. *See Bunger v. University of Oklahoma Board of Regents*, 95 F.3d 987 (10th Cir. 1996). In *Bunger*, non-tenured employees argued that the procedural guidelines in the Faculty Handbook created a property interest in reappointment of which they could only be divested according to the specified procedures. The court rejected this argument, holding that the university's promise to follow certain procedures in considering reappointment did not create a property interest in reappointment. *Id.* at 991. The court relied on reasoning from the United States Supreme Court that " 'property' cannot be defined by the procedures provided for its deprivation anymore than can life or liberty." *Id.* (citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985)).

The Eleventh Circuit has also recognized this distinction between procedure and a substantive right. *See Harris v. Birmingham Bd. of Ed.*, 817 F.2d 1525, 1528 (11th Cir. 1987). The court explained that "[a]lthough the state statutory notice requirement is stated in mandatory language, it is a purely procedural requirement and not a substantive predicate to terminate which gives [the plaintiff] a protected liberty or property right in receiving a notice which itself detailed the reasons for termination." *Id.* at 1527.[5] Because a promised procedure cannot, by

[5] To the extent that the Plaintiff also seeks to argue that he had a protected interest in having specific reasons be given to him as

itself, confer a property right, the court finds that the Plaintiff had failed to establish that he had a legitimate entitlement to continued employment based on Faculty Handbook procedural provisions.

The Plaintiff has also sought to bring a claim for deprivation of due process based on an alleged liberty interest. To prove a deprivation of liberty triggering due process rights, a government employee must "establish that his termination was attended by stigmatizing charges which 'might seriously damage his standing and association in his community' or foreclose 'his freedom to take advantage of other employment opportunities.'" *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182 (11th Cir. 1985) (citation omitted). This liberty interest has been qualified by the United States Supreme Court, however, so that where there is no public disclosure of the reasons for discharging a public employee, no liberty interest is implicated. *Bishop v. Wood*, 426 U.S. 341, 348 (1976).

The Defendants have moved for summary judgment on the deprivation of a liberty interest claim, arguing that the uncontested facts reveal that no stigmatizing statements were made about the Plaintiff and, even if any statements were made, no statements were ever made public by the Defendants. The Plaintiff has not provided any evidence in response to the Defendants' motion with respect to the deprivation of a liberty interest claim. Accordingly, because the Plaintiff has failed to demonstrate that there is a genuine issue of fact as to whether stigmatizing statements were made public by the Defendants, the court concludes that the Defendants are entitled to summary judgment on the Plaintiff's claim for deprivation of a liberty interest without due process.

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a justification for his discharge based on the procedure set forth in the Faculty Handbook, this argument is also unavailing. *See Harris*, 817 F.2d at 1527.

b. Substantive Due Process

In addition to his procedural due process claim, the Plaintiff seeks to bring a claim for denial of substantive due process, arguing that the Defendants's actions were arbitrary, unreasonable, and capricious. A finding that a right merits substantive due process protection means that the right is protected "against" certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (citation omitted). Formerly, under precedent of the Eleventh Circuit, a public employee could assert a claim for pretextual termination under the substantive component of the Due Process clause. However, as the Defendants point out, the Eleventh Circuit reversed this precedent by holding that, in non-legislative cases, only procedural due process claims are available to pretextually terminated employees. *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1994), *cert. denied sub nom., McKinney v. Osceola County Bd. of County Com'rs*, 513 U.S. 1110 (1995). In *McKinney*, the court reasoned that "Because employment rights are state-created rights and are not 'fundamental' rights created by the Constitution, they do not enjoy substantive due process protection." *Id.* at 1560.

The Plaintiff asks this court to distinguish *McKinney* because the Plaintiff had a fundamental right to practice his chosen profession. However, in the portion of the Complaint in which he alleges a violation of substantive due process, the Plaintiff states that the Defendant acted arbitrarily and failed to follow their own ordained procedures. Complaint, page 6. The Plaintiff's claim based on his perceived right to a notice and hearing under the policies of TSUM, an alleged deprivation of procedural due process, is therefore barred under *McKinney*.

Furthermore, to the extent that the Plaintiff now seeks to bring a claim based on a fundamental right, he has

failed to establish such a claim. As the Defendants point out, the court in *McKinney* reiterated that to be afforded substantive due process, the right must be so fundamental that our democratic society and its inherent freedoms would be lost if that right were to be violated. *Id.* at 1561. The Supreme Court has recognized that the right to follow a chosen profession free from unreasonable government interference comes within the "liberty" and "property" concepts of the Fifth Amendment. *See Greene v. McElroy*, 360 U.S. 474 (1959). However, deprivation of this right cannot be established unless the plaintiff has been banned from engaging in his profession with any employer. *See Pirolo v. City of Clearwater*, 711 F.2d 1006, 1011 (11th Cir. 1983); *see also Morley's Auto Body, Inc. v. Hunter*, 70 F.3d 1209, 1217 n. 5 (11th Cir. 1995). Therefore, even if this right were a valid basis upon which to distinguish *McKinney*, it would not be applicable in this case, since no evidence has been presented that the Plaintiff has been precluded from pursuing his profession with all employers. Therefore, the Defendants are entitled to summary judgment on the substantive due process claim.[6]

c. First Amendment

The Plaintiff has also asserted that the Defendants violated his First Amendment right to freedom of speech.

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[6] The Plaintiff also argues that even if *McKinney* precludes his substantive due process claim under federal law, that he has a right to substantive due process under the Alabama Constitution. The Plaintiff has failed to point to any Alabama statutory or decisional law under which such a claim for violation of the Alabama Constitution may be brought. Furthermore, the Defendants have pointed out that state officials acting within their discretionary authority are afforded substantive immunity from suit under state law. *Tinney v. Shores*, 77 F.3d 378 (11th Cir. 1996); *DeStafney v. University of Alabama*, 413 So.2d 391 (Ala. 1981) (substantive immunity extends to university employees who are acting pursuant to their discretionary function). Therefore, the court concludes that the Defendants are entitled to summary judgment on all of the Plaintiff's purported state constitutional law claims.

A claim by a public employee that he was punished for exercising his right to freedom of speech requires the court to conduct a four part inquiry. First, the court must determine whether the alleged speech implicated a matter of public concern. *Watkins v. Bowden,* 105 F.3d 1344 (11th Cir. 1997) (citation omitted). If so, the court must weigh the employee's First Amendment interest against the interest of the public employer. *Id.* at 1352; *Pickering v. Bd. of Ed.,* 391 U.S. 563, 568 (1968) (the court must balance "an employee's interests as a citizen in commenting on matters of public concern . . . against the state's interest as an employer 'in promoting the efficiency of the public services it performs through its employees.' "). If the employee prevails on the balancing test, the fact-finder determines whether the employee's speech was a substantial motivating factor in the employment decision. *Watkins,* 105 F.3d at 1352. Then, the state must prove by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Id.*

In deciding whether an employee's speech addresses a matter of public concern, the court must look to the content, form, and context of the employee's speech. *Bryson v. City of Waycross,* 888 F.2d 1562 (11th Cir. 1989). Courts "consider whether the speech at issue was made primarily in the employee's role as citizen, or primarily in the role of employee." *Morgan v. Ford,* 6 F.3d 750 (11th Cir. 1993), *cert. denied,* 512 U.S. 1221 (1994). The "First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick v. Myers,* 461 U.S. 138, 149 (1983). In the Eleventh Circuit, a "public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run." *Ferrara,* 781 F.2d 1516. Instead, to rise to a level of public concern, statements must be directed "beyond the scope of

internal management." *Kurtz v. Vickrey*, 855 F.2d 723 (11th Cir. 1988). In the context of an educational setting, "speech that concerns internal administration of the educational system and personal grievances will not receive constitutional protection." *Maples v. Martin*, 858 F.2d 1546, 1552 (11th Cir. 1988). A teacher's speech is a matter of public concern when it "directly affects the public's perception of the quality of education in a given academic system." *Id.* at 1553.

In the Complaint filed in this case, the Plaintiff presents three different kinds of statements which he contends were statements on a matter of public concern. These statements include the Plaintiff's request for funding of the TSUM CIS/Math division, comments in the annual review of another faculty member, and comments on the election procedures used for electing a faculty office. In arguments presented to the court, the Plaintiff has pointed to several additional statements which he contends were a matter of public concern, including speech against a faculty evaluation system, opposing a tenure and promotion policy, statements regarding the "future health and vitality" of the department, and a challenge to Defendant Curry on a budget process.[7] The court notes first that none of the comments allegedly made by the Plaintiff were voiced outside of TSUM. The court recognizes that the fact that the Plaintiff's comments were confined to TSUM is not dispositive,

[7] The Plaintiff has also cited to pages 55 through 77 of Defendant Curry's deposition for the proposition that "the sole reason for her decision to terminate Boyett was his statements regarding numerous topics of concern at that public institution." Plaintiff's Brief in Response to the Motion for Partial Summary Judgment, page 8. Apparently, this evidence is offered as evidence of a causal connection, and not as additional examples of speech, since the Plaintiff has neither pointed to, nor presented arguments about, examples of speech within the cited portion of Defendant Curry's Deposition. Furthermore, upon review of the cited section, the court finds no additional examples of speech by the Plaintiff.

however, it is a factor which may be taken into account by the court. *Kurtz,* 855 F.2d at 727.

The Plaintiff asserts that his comments on the funding of the TSUM CIS/Math division were a matter of public concern. The Plaintiff has cited *Kincade v. City of Blue Springs,* 64 F. 3d 289 (8th Cir. 1995), for the proposition that complaints about the misuse of public funds is a matter of public concern. While the court agrees that complaints about the misuse of public funds can be a matter of public concern, the court finds that the evidence presented by the Plaintiff does not support the Plaintiff's apparent characterization of his statements as being complaints about the misuse of funds. The evidence presented by the Plaintiff reveals that the academic units of TSUM presented their budget requests to the Council of Deans which then voted on the priority of the requests. Alexander Deposition, page 40. The Plaintiff made comments in an attempt to secure more funds for the department which he worked. *Id.* at pages 40-41; Plaintiff's Exhibit G, Comments on the Performance of Dr. Joseph Boyette, page 1. However, there is no evidence to support an allegation that the Plaintiff was speaking out against a misuse of funds. Consequently, the court finds that the content, context, and form of the Plaintiff's comments as an employee to other TSUM employees in an attempt to get priority for funds for his department, reveals that this speech on the part of the Plaintiff is speech on an issue of internal administration and not a public concern.

With regard to his speech concerning funds for this department, the Plaintiff has also cited cases from other jurisdictions for the proposition that an employee's criticism of an employer's policies or positions on issues is a matter of public concern. Without deciding that issue, the court finds that the Plaintiff's evidence does not support his apparent characterization that his attempts to

get funding were criticism of a policy or a position of his employer. Instead, the evidence reflects that he made comments in seeking resources and support for his department within TSUM, *See* Plaintiff's Exhibit G, not that he was critical of any policies or positions taken by his employer regarding funding for the department.

The Defendants point out that the Plaintiff stated in his deposition that he felt his speech was of public concern because he sought grants which would allow the school to seek better teachers, which would lead to improvement in the quality of the students, which would in turn attract industry to the state. Boyett Deposition, page 89. However, derivative public concern arguments have been rejected by courts in this circuit. *See Ballard v. Blount,* 581 F. Supp. 160 (N.D. Ga. 1983), *aff'd,* 734 F. 2d 1480 (11th Cir.) *cert. denied,* 469 U.S. 1086 (1984). In *Ballard,* the court reasoned that "[t]aken to its logical conclusion, the plaintiff's argument means that any time a person's speech will have an affect on the public, regardless of how small or unlikely that effect may be, that speech relates to a matter of public concern. This was a specific concern of the *Connick* Court, and the Court wisely rejected this identical argument." *Id.* at 164. Consequently, this court concludes that the Plaintiff's comments on the internal issue of seeking funds for a department is not a matter of public concern.

The Plaintiff has argued in brief that he made comments in reviewing faculty members. Evidence provided to the court establishes that the Plaintiff made unfavorable comments in the annual review of Defendant Mariano. The Fourth Circuit has addressed a similar First Amendment argument. *See Holland v. Rimmer,* 25 F. 3d 1251 (4th Cir. 1994). In *Holland,* a plaintiff made statements about and disciplined subordinates because of their performance as employees. *Id.* at 1255. In analyzing the form and context of such statements, the court stated

that because the statements were made by a supervisory employee to other employees and not as a citizen speaking out to the public, they were not matters of public concern. *Id.* (citing *Kurtz v. Vickrey*, 855 F. 2d 723, 727 (11th Cir. 1988)). The court reasoned that "the content, internal employee discipline, and the context, in-house communications between employees speaking as employees" convinced the court that the speech was not a matter of public concern. *Id.* Similarly, the court finds that the context, form, and content of the Plaintiff's comments as an in-house review concerning Defendant Mariano's performance were similarly internal matters which did not rise to the level of public concern.

The Plaintiff argues that he commented on the "health and vitality" of his department. However, the evidence presented to the court establishes that Defendant Alexander characterized a conversation he had with the Plaintiff as concerning the "health and vitality of the department." Alexander's Deposition, page 68. The only evidence provided to the court of the Plaintiff's comments during this conversation comes from Defendant Alexander's deposition in which he states that the Plaintiff's comments during his conversation were made in opposition to Defendant Mariano's appointment as dean. *Id.* pages 68-9. The Defendants point out that federal courts have held that comments in opposition to the appointment of persons to positions within a department which do not attempt to bring to light fraud or wrongdoing, but are personal grievances are not a matter of public concern. *See e.g. Harris v. Merwin*, 901 F. Supp. 509 (ND. NY 1995). In the instant case, the evidence establishes that the Plaintiff's comments were made in the context of what Defendant Alexander characterizes as the Plaintiff's attempts to "derail" the appointment of Defendant Mariano. Alexander Deposition at page 68. There is no evidence to indicate that the Plaintiff's alleged speech was anything more than a personal grievance with the

appointment of Defendant Mariano. Therefore, the court concludes that based on the content, context, and form of these comments, the speech was not a matter of public concern.

The Plaintiff also has provided evidence that he criticized the method by which faculty members were elected to the Graduate Council. The plaintiff felt that all graduate faculty should be allowed to vote for a representative on the Graduate Council. The Defendants have pointed out that the Tenth Circuit, in addressing similar comments concerning the availability of Graduate Council positions to tenured and non-tenured persons, held that such comments were not of public concern. *Bunger v. University of Oklahoma Board of Regents*, 95 F. 3d 987 (10th Cir. 1996). The court reasoned that the "organization of such internal governing bodies is not an issue of social importance or heightened public interest." *Id.* at 992. Similarly, this court finds that the Plaintiff's evidence of his comments on the election of members to the Graduate Council indicate that his speech concerned an internal management dispute and that the plaintiff was speaking as an employee, not a citizen.[8]

The Plaintiff also alleges that his comments on a policy for internal evaluation of tenure and promotion applica-

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[8] The court notes that the Plaintiff filed a grievance with regard to this issue and that the Plaintiff's recommendation was ultimately accepted. In the Complaint, the Plaintiff alleges that his right to petition the government for the redress of grievances has been violated by the Defendants. The Defendants have pointed out that to prevail on such a claim, the Plaintiff must show that the subject of the grievance was a public concern. *See Renfroe v. Kirkpatrick*, 722 F. 2d 714 (11th Cir. 1984). The Plaintiff apparently has not directly responded to the Defendants' arguments with respect to the right of petition. Because the Plaintiff has provided no evidence of any other grievances which might form the basis of this claim, and because the grievance about which evidence has been produced is not a matter of public concern, the court finds that the Defendants are entitled to summary judgment on the right to petition claim.

tions of the faculty were of public concern. The evidence cited by the Plaintiff, Defendant Alexander's Deposition, reflects Defendant Alexander's opinion that the Plaintiff was insubordinate by not objecting to the proposed policy when it was before the Council of Deans, but waiting to voice opposition in front of the full faculty. Alexander Deposition, page 48. This evidence reflects that the Plaintiff spoke out against a procedure which was being considered which apparently would set guidelines for evaluating tenure and promotion applications. From the evidence that has been provided of the content, form, and context of this speech, therefore, the court concludes that the Plaintiff's speech was commentary on an internal procedure to be applied within TSUM, and involved no substantive issues that could influence the public's perception of the quality of education provided. *Compare Maples v. Martin*, 858 F. 2d 1546, 1553 (11th Cir. 1988) (plaintiff's speech was of public concern because although it was critical of the way the department was managed it "also involves substantive issues that could influence the public's perception of the quality of education").

The Plaintiff has also pointed to statements which he has characterized as "statements regarding Curry's alleged misrepresentation regarding university budgets." Plaintiff's Brief in Response to the Motion for Partial Summary Judgment, page 12. In support of his argument that this speech was constitutionally protected, the Plaintiff quoted Defendant Alexander's statement that he was "incensed" by the Plaintiff's speech. Plaintiff's Brief in Response to the Motion for Partial Summary Judgment, page 12. This evidence quoted by the Plaintiff might have some bearing on the question of a causal relationship between speech and an adverse employment action, but it does not establish that the Plaintiff spoke on a matter of public concern.

The court recognizes, however, that the Plaintiff was likely relying on the content of two pages of Defendant Alexander's deposition to which he cited, rather than

just the portion that he quoted, since the Plaintiff cited this evidence to show a parallel to the Second Circuit's decision in *Bernheim v. Litt*, 79 F. 3d 318 (2nd Cir. 1996). The court finds that *Bernheim* does not stand for the broad proposition for which the Plaintiff has cited it, however. Although the Plaintiff has cited *Bernheim* for the proposition that misrepresentations are a matter of public concern, the court in *Bernheim* stated that the statements "regarding the quality of education provided by the public school as measured by achievement test scores and their year-to-year improvement or deterioration on a schoolwide basis may reasonably be considered a matter of public concern." *Id.* at 325. It appears, therefore, that the court focused on the content of the plaintiff's speech, not merely the fact that it was speech about alleged misrepresentations. The speech was also made in the context of reports to various authorities. *Id.* at 324.

In addition, while the Plaintiff in this case has characterized his comments as being about misrepresentations made by Curry regarding school budgets, the Plaintiff's evidence with regard to his alleged speech regarding university budgets is that "Dr. Curry had presented some information about the budget and about where we were. And [the Plaintiff] questioned whether or not faculty had had input into the budget process . . . essentially leading a charge that the faculty had no input in the budget process." Alexander Deposition, pages 29, 30. Consequently, the evidence cited by the Plaintiff does not support his characterization that he spoke out about misrepresentations regarding university budgets. Drawing all inferences in favor of the Plaintiff, the evidence provided by the Plaintiff establishes that the Plaintiff alleged that the faculty did not have input into the budget process. The content, form, and context of this speech indicates that the Plaintiff's comments over whether the faculty had input into the budget process was speech on an internal

administrative matter and did not concern the public's perception of the quality of education.

The evidence provided to the court of comments which were made by the Plaintiff about the faculty evaluation process is also found in Defendant Alexander's deposition. According to Defendant Alexander, the Plaintiff voiced opposition to implementation of a faculty evaluation policy, stating that faculty evaluation should not be conducted in the setting of TSUM. Alexander Deposition page 47. The Plaintiff also stated that he wanted no part of an evaluation system. *Id.* The content of the Plaintiff's speech, his opposition to an evaluation system and statement that he would have no part of it, and the context of his statement, statements made to the person who proposed implementing the procedure, reflect that his speech is an "employee grievance concerning internal school policy." *Ferrara*, 781 F. 2d at 1515. Because a personal grievance does not rise to the level of a public concern merely because the plaintiff claims that the public has an interest in the way public institutions are run, the court finds that the Plaintiff's evidence does not establish that he spoke on a matter of public concern. *Id.*[9]

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[9] Even if the court concluded that the Plaintiff spoke on a matter of public concern, the Plaintiff has not established that these instances of speech have been defined as matters of public concern under clearly established law. *See Williams v. Alabama State Univ.*, 102 F. 3d 1179, 1183 (11th Cir. 1997) (finding that the plaintiff had an interest in speaking on a matter, but that whether the speech was a matter of public concern was not clearly established). Furthermore, even if the speech is of public concern under clearly established law, the Defendants are entitled to qualified immunity unless *Pickering* balancing would lead to the inevitable conclusion that the discharge of the Plaintiff was unlawful. *Dartland v. Metropolitan Dade County*, 866 F. 2d 1321, 1323 (11th Cir. 1989). Based on the evidence presented, the court cannot conclude that this case is an "extraordinary case" in which the *Pickering* balancing would lead to the inevitable conclusion that the Plaintiff was unlawfully discharged.

Because the Plaintiff has failed to establish that he spoke on a matter of public concern, the Defendants are entitled to summary judgment on the Plaintiff's First Amendment claim.[10]

V. CONCLUSION

The court concludes that because the Plaintiff has failed to demonstrate that there are disputed issues of fact with regard to his federal constitutional claims, the Defendants are entitled to judgment as a matter of law on the Plaintiff's claims under the United States Constitution. The Defendants are also entitled to summary judgment on the Plaintiff's claims asserted under the Alabama Constitution of 1901. Therefore, the Motion for Partial Summary Judgment is GRANTED, and it is hereby ORDERED that judgment is entered in favor of all Defendants and against the Plaintiff on Count I, Count II, and Count III of the Complaint, and in favor of the individual defendants on Count IV of the Complaint.

The case will proceed to trial as against TSUM on Count IV of the Complaint.

Done this 9th day of July, 1997.

/s/ W. Harold Albritton
United States District Judge

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[10] Because the Plaintiff has failed to establish a claim for a constitutional violation, the state officials are also entitled to summary judgment as to any claim the Plaintiff may have made for prospective injunctive relief as against the individual defendants in their official capacities.

APPENDIX C

[Filed July 31, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6691

JOSEPH E. BOYETT, DR.,
Plaintiff-Appellant,

versus

TROY STATE UNIVERSITY AT MONTGOMERY (TSUM);
JACK HAWKINS, JR., DR., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: COX, BLACK, and HULL, Circuit Judges

PER CURIAM

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
United States Circuit Judge

Supreme Court, U.S.
FILED
NOV 30 1998
CLERK

No. 98-699

In The

Supreme Court of the United States

October Term, 1998

JOSEPH E. BOYETT,

Petitioner,

vs.

TROY STATE UNIVERSITY MONTGOMERY (TSUM); DR. JACK HAWKINS, JR., individually and as Chancellor of the Troy State University System; DR. GLENDA McGAHA-CURRY, individually and as president of TSUM; DR. LIVINGSTON ALEXANDER, individually and as Vice President for Academic Affairs of TSUM; DR. MATTHEW MARIANO, individually and as Interim Dean of Computer & Information Science and Mathematics Division,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Accurately phrased in light of the record, the questions presented are as follows:

1. Whether Petitioner's statements within the University budget process seeking more money for his academic division addressed a matter of public concern as required by *Connick v. Myers*, 461 U.S. 138 (1983).

2. Whether Petitioner's internal University grievance concerning a Graduate Council run-off election and asserted through a right to petition claim was subject to the *Connick* standard.

3. Whether Petitioner as a nontenured probationary employee had a constitutional right to a hearing on his nonrenewal.[1]

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1. Respondents submit that the questions phrased by Petitioner are deficient because Question No. 1 fails to include the fact that the statements were in the context of the University's internal budget process, Question No. 2 erroneously states the issue in terms of conditions on the right to petition, and Question No. 3 erroneously assumes Petitioner had "a property right."

PARTIES TO THE PROCEEDINGS

Respondents agree with Petitioner that all parties to this petition are named in the caption of the case. Troy State University Montgomery (TSUM or the University) is part of the Troy State University System, which is a public entity of the State of Alabama.

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STATEMENT OF THE CASE

TSUM takes no exception to Petitioner's Statement of the Case, but the implication in the petition that there was no legitimate reason for the nonrenewal of this nontenured probationary employee should be compared with the Court of Appeals' observation that "[b]y many accounts he had a stormy sojourn at TSUM, especially during a period in which he served as dean of the [CIS] Division" and "was particularly adept at rubbing his superiors the wrong way," being described as "impossible to work with" and "belligerent and loud, argumentative, especially when there is a hidden agenda.' " App. 2a.[2]

REASONS FOR DENYING THE WRIT

This is another in the long line of efforts by nontenured probationary faculty to challenge their nonrenewal by constitutional claims based on 42 U.S.C. § 1983.[3] *E.g.*, *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 426 (1st Cir. 1986) ("The first amendment does not require that each nontenured professor be made a sovereign unto himself.").[4] The District Court's ruling on the § 1983 claims has been reviewed and affirmed by the Court of Appeals for the Eleventh Circuit, with a petition for rehearing *en banc* being denied. App. 1a, 7a, and 30a. Nothing warrants further review by the Supreme Court.

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2. References are to the Appendix in the petition.

3. Boyett had a full trial on his claim based on the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, with the jury returning its verdict against him. No appeal was taken from that result.

4. Then Circuit Judge Breyer was on the panel.

I.

THE COURT OF APPEALS' DECISION ON THE SPEECH CLAIM IS IN CONFORMITY WITH SETTLED LAW.

Relying on *Connick v. Myers*, 461 U.S. 138 (1983), the courts below held that Boyett failed to satisfy the threshold prerequisite of speaking on a matter of public concern. App. 3a, 19a-29a. With *Connick's* public concern prerequisite having been recently reiterated,[5] he could not ask the Court to abandon or limit it. He instead asks the Court to sit as a third layer canvasser of the record and to reach the opposite result from the courts below, but "we 'do not grant a certiorari to review evidence and discuss specific facts.' " *Superintendent v. Hill*, 472 U.S. 445, 460-461 (1985) (concurring/dissenting opinion).

A. It concerned only his division's share of the University's budget:

He attempts to equate his speaking to the proposition in *Pickering* that "the question whether a school system requires additional funds is a matter of legitimate public concern,"[6] which is indisputably so and equally irrelevant to the situation here concerning the internal allocation of the University's budget among its academic divisions.

The academic divisions are (a) Arts & Sciences, (b) Business, (c) Counseling, Education, and Psychology,

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5. *Waters v. Churchill*, 511 U.S. 661, 668 (1994) ("the speech must be on a matter of public concern . . ."); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1996) (quoting *Connick's* demarcation between speaking as a citizen and speaking as an employee.).

6. *Pickering v. Board of Education*, 391 U.S. 563, 571-572 (1968).

(d) Distance Learning, and (e) Computer Information Sciences/ Mathematics (the "CIS division."). He was dean of the CIS division until he resigned in September 1995. The procedure for dividing the University's "very limited funding" among the academic divisions consists of (a) presentation of requests by each dean, (b) ranking of the requests by the Council of Deans, and (c) presentation of the Council of Deans' proposals to the University's budget committee. The speaking in question is described in the allegation of the complaint that he "regularly attempted to obtain additional funding and grants for the Division of Computer and Information Sciences and Mathematics. . . ." His testimony was that in doing so "I used the existing process" and spoke only within the University.

There is nothing remarkable about the holdings of the courts below that he was speaking in his role as an employee rather than in his role as a citizen. *Connick*, 461 U.S. at 147.

B. Comparison with *Connick*:

A comparison of this case with *Connick* confirms that the right result has been reached. It held that "with but one exception, the questions posed by Myers to her co-workers do not fall under the rubric of matters of 'public concern.' " 461 U.S. at 148. The single exception was "Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?" (Question No. 11), which has no arguable counterpart in this case. The 13 subjects which were not of public concern included questions coming closer to the public concern threshold (but without satisfying it) than Boyett's lobbying within the University's budget process for a bigger slice of a thin pie for his academic division.[7] With those

7. Examples are (a) whether a rumor mill was affecting the working performance of Assistant District Attorneys, (b) whether they had confidence and trust in superiors, and (c) whether a grievance committee would be worthwhile for the office. 461 U.S. at 155-156.

subjects in *Connick* not being matters of public concern, the courts below were entirely right in holding that Boyett's quest for more money from the University's budget failed to satisfy the *Connick* public concern standard.

So also, the Court of Appeals was right in saying that "Boyett's speech resembles more closely the sort of complaints about internal administrative matters that courts have found not to be of public concern." App. 3a. *Connick*, 461 U.S. at 149 ("the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs."). It is particularly compelling in cases coming from universities with their well-known tradition of campus in-fighting. *Bunger v. University of Oklahoma Board of Regents*, 95 F.3d 987, 992 (10th Cir. 1996) ("Although many an academic donnybrook has been fought over such administrative rules, the issues at stake rarely transcend the internal workings of the university to affect the political or social life of the community.").[8]

He argues it is not important that he spoke only within the University, but he can derive no comfort from *Givhan*[9] since it had nothing to do with the public concern prerequisite. In the context of the public concern standard, the fact he spoke only internally was among the circumstances properly considered. *Connick*, 461 U.S. at 148 ("Myers did not seek to inform the public that the District Attorney's Office was not discharging

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8. *See also Colburn v. Trustees of Indiana University*, 973 F.2d 581, 586-587 (7th Cir. 1992) ("the Sociology Department's deterioration was principally of importance to the few faculty members who had to tolerate the bickering.").

9. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

its governmental responsibilities in the investigation and prosecution of criminal cases.").[10]

He argues that being motivated "by his personal feelings" in seeking more money for his division is of no moment. That is immaterial argument since neither the District Court nor the Court of Appeals relied on his personal motivations. Even if it were otherwise, it would certainly be permissible to consider the extent to which he was motivated by empire-building within the University. *Connick*, 461 U.S. at 148 ("We view the questions . . . [held not to be matters of public concern] as mere extensions of Myers' dispute over her transfer to another section of the criminal court.").

His final argument is that he was "a divisional spokesperson advocating his colleagues' views on the amount of funding needed for that division," but that hardly elevates it to a public concern. *Connick's* public concern requirement would be reduced to a nullity if it could be avoided by the expedient of allegedly acting as a "spokesperson" for co-workers. *Colburn v. Trustees of Indiana University*, 973 F.2d 581, 587 (7th Cir. 1992) (rejecting plaintiffs' reliance on the theory they were speaking for "everyone in the department's interest.").

II.

HIS ARGUMENT FOR A DIFFERENT STANDARD FOR GRIEVANCES DOES NOT WARRANT SUPREME COURT REVIEW.

Boyett's grievance concerned the procedure for a run-off election for the Graduate Council, which "represents the faculty,

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10. In contrast is *United States v. National Treasury Employees Union*, 513 U.S. 454 (1996) ("the speeches and articles . . . were made outside the workplace. . . .").

the graduate faculty, in approving all changes to the graduates' curriculum." The position he espoused was adopted. It would be futile to continue to argue that the procedure followed in a single run-off election for an internal faculty committee was a public concern. App. 25a. *Bunger*, 95 F.3d at 992 ("The question of whether an administrative council in a university is limited to tenured faculty or opened to untenured faculty is a matter of internal structure and governance."). He therefore asks the Court to carve out a different standard for right to petition claims, resulting in any and all grievances by public employees "plant[ing] the seed of a constitutional case." *Connick*, 461 U.S. at 149.

A. The premise of the argument is contrary to this Court's precedents:

The premise of the argument — that the right to petition should stand on a higher plane than other First Amendment rights — could not be more at odds with this Court's precedents.

The Court has said that "[a]lthough the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis." *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985). It has said that

> [t]o accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. . . . These First Amendment rights are inseparable [citation omitted], and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

McDonald v. Smith, 472 U.S. 479, 485 (1985).

How then can he say *DeJonge v. Oregon*, 299 U.S. 353 (1937) implicitly noted that the right to petition the government for redress of grievances is a fundamental right separate and distinct from the rights of free speech and free press, or the right to peaceable assembly? He reasons (a) the Court said the rights of speech and press and peaceable assembly are cognate but (b) did not say anything (one way or another) about the right to petition so (c) ergo, the Court must have meant the right to petition is "separate and distinct." That logic would have been specious in 1937. In light of the Court's decisions since then in *Wayte* and *McDonald*, it is beyond illogical today. *Belk v. Town of Minocqua*, 858 F.2d 1258, 1262 (7th Cir. 1988) ("as *McDonald* suggests . . . such special treatment of the right to petition would unjustly favor those who through foresight or mere fortuity present their speech as a grievance rather than in some other form.").

The contention that the public concern standard can be avoided by traveling on the petition clause is as well at odds with *Connick*, for the Court said that Myers' "survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy" and that the First Amendment "does not require a grant [to public employees] of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." 461 U.S. at 147, 154. Moreover, *Connick's* bedrock — "our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office"[11] — applies equally to all speech in the workplace regardless of whether it is expressed verbally or through grievances. *Day v. South Park Independent School District*, 768 F.2d 696, 701 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986) (the contention

11. 461 U.S. at 154.

"assumes that when a government employer deals with its own employees, the protection afforded by the petition clause is entirely discrete from and broader than the shield afforded by the other clauses of the first amendment, a premise that is undermined by the Supreme Court's repeated references to these clauses as being overlapping.").

B. All but one of the Circuits considering the contention have rejected it:

The argument that the right to petition enjoys absolute protection is rested solely on *San Filippo v. Bonglovanni*, 30 F.3d 424 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995), but that is a minority of one. Every other Circuit which has considered the question has rejected the argument, with most of them relying on *Connick*, *Wayte*, or *McDonald*. *E.g.*, *Belk*, 858 F.2d at 1261 ("Were we to adopt [plaintiff's] position that the right to petition is absolute, we would be guilty of implementing precisely the sort of hierarchy of first amendment rights forbidden by *McDonald*.").

Second Circuit: *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2nd Cir. 1993) ("The First Amendment right to petition . . . is 'generally subject to the same constitutional analysis' [*Wayte*] as the right to free speech.").[12]

Fourth Circuit: *Thorne v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988) ("*McDonald* clearly states that the Petition Clause does not enjoy a special status among the First Amendment guarantees . . . we reject Thorne's argument that the Petition

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12. *See also McEvoy v. Spencer*, 124 F.3d 92, 97 n.1 (2nd Cir. 1997) ("Because the right to petition and the right to free speech 'are related and generally subject to the same constitutional analysis' [*Wayte*], we will not discuss separately McEvoy's right to petition claim.").

Clause enjoys a 'preferred place' among First Amendment freedoms.").

Fifth Circuit: *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989) ("The law [*Connick*] is no different where the act which allegedly gave rise to the retaliation claim is the filing of a grievance or a lawsuit.").[13]

Sixth Circuit: *Valot v. Southeast Local School District Board of Education*, 107 F.3d 1220, 1226 (6th Cir. 1997), *cert. denied*, 522 U.S. __, 118 S. Ct. 164, 139 L. Ed. 2d 108 (1997) ("A cause of action for violation of the Petition Clause is subject to the same analysis applied to a claim arising under the Speech Clause. . . . Specifically, the right to petition is limited to matters of public concern.").

Seventh Circuit: *Lashbrook v. Oerkfitz*, 65 F.3d 1339, 1349 (7th Cir. 1995) ("In order to state a claim for retaliation for exercising first amendment rights by petitioning the government for redress of grievances, a plaintiff must allege that the petition touched upon matters of public concern.").[14]

Eighth Circuit: *Hoffmann v. Mayor, Councilmen, and Citizens of Liberty*, 905 F.2d 229, 233 (8th Cir. 1990) ("the petition clause provides no lesser or greater guarantee of free expression than the speech clause . . .").

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13. *See also Day*, 768 F.2d at 701.

14. *See also Gray v. Locke*, 885 F.2d 399, 412 (7th Cir. 1989) ("in deciding whether a public employer has wrongfully deprived an employee of his right to petition the government, our inquiry must begin with whether the petition touched upon a matter of public concern by looking at the content, form, and context of the petition."); *Belk*, 858 F.2d at 1261-1262.

Ninth Circuit: *Rendish v. City of Tacoma*, 123 F.3d 1216, 1220 (9th Cir. 1997), *cert. denied*, 524 U.S. __, 118 S. Ct. 2368, 141 L. Ed. 2d 737 (1998) ("We now hold that a public employee's litigation must involve a matter of public concern in order to be protected by either the Petition Clause or the Speech Clause of the First Amendment."); *Gearhart v. Thorne*, 768 F.2d 1072, 1073 (9th Cir. 1985) (plaintiff's "grievances related only to . . . 'matters only of personal interest' [*Connick*], and do not invoke first amendment protection.").

Tenth Circuit: *Schalik v. Gallemore*, 906 F.2d 491, 498 (10th Cir. 1990) (plaintiff's "right to petition is inseparable from her right to speak. As such, we see no reason to subject this claim to a different sort of analysis.").

Eleventh Circuit: *Grigley v. City of Atlanta*, 136 F.3d 752, 754-755 (11th Cir. 1998) (rejecting the contention as contrary to *McDonald* and *Connick*).[15]

The "Circuit split" is thus minimal, as the Third Circuit stands alone. Boyett says it is "arguably supported by the Ninth and Tenth Circuits," but it is not even arguable. The cases he cites are not at all on point.[16] Both the Ninth and Tenth Circuits

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15. *See also Renfroe v. Kirkpatrick*, 722 F.2d 714, 715 (11th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984) ("It is now clear that plaintiff's grievance is protected under the First Amendment only if it related to a matter of public concern.").

16. *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) said only that "[t]he right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances," with no argument concerning the public concern standard; *Morfin v. Albuquerque Public Schools*, 906 F.2d 1434, 1437-1439 (10th Cir. 1990) concerned the right of labor union association and reiterated the *Connick* principle that "[p]ublic employees may not be retaliated (Cont'd)

are squarely in the majority camp in their holdings directly on point.[17]

C. This is not an appropriate vehicle for consideration of the Third Circuit's position:

With the continuing rejection of its view by every other Circuit which has considered it, the minor rift may well resolve itself by the Third Circuit joining the rest of the Circuits. If not, that would be the appropriate time for this Court to consider the question with the benefit of the Third Circuit's explanation of the reasons for adherence to such a solitary position.

In contrast, this case would be a most inappropriate vehicle. Because the Eleventh Circuit is with the majority, the idea that the right to petition is "more equal" than the right to speech was asserted for the first time in Boyett's petition for *en banc* rehearing, which was denied without opinion. App. 30a. There accordingly is no expression of views by the District Court or the Court of Appeals on the subject. So also, since the Third Circuit's position is at odds with this Court's principle that "there is no sound basis for granting greater constitutional protection to statements made in a petition,"[18] the question, if it is to be reviewed, should be evaluated in a case from that Circuit rather than in this case from a Circuit in alignment with this Court's pronouncement on the subject.

(Cont'd)
against for 'speech on a matter of public concern,' i.e., 'political, social, or other concern to the community.' "

17. The Ninth Circuit in *Rendish*, 123 F.3d at 1220, and *Gearhart*, 768 F.2d at 1073, and the Tenth Circuit in *Schalik*, 906 F.2d at 498.

18. *McDonald*, 472 U.S. at 485.

III.

HIS DUE PROCESS CLAIM WAS CONTRARY TO PRECEDENT.

Boyett's final claim required him to show he had a property interest in continued employment. *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972).[19] It is a virtually verbatim repetition of the claim asserted by the nontenured college professor in *Roth*, 408 U.S. at 569 ("The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons [for nonrenewal] and a hearing on the University's decision not to rehire him for another year. We hold that he did not."). Here, as in *Roth*, Boyett has no due process claim because he

> surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 578.

He argues for a different result by saying "the creation of a 'for cause' standard for termination gives rise to federally mandated rights to procedural due process," but that is a non-existent distinction because there is no " 'for cause' standard" in the case of a nontenured probationary employee. On the contrary, the Faculty Handbook provides that with nontenured faculty, "a severance prerogative rests with both parties."[20] That

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19. The requirement of "a constitutionally protected 'property' interest" was again stated in *Gilbert v. Homar*, 520 U.S. 924 (1997), where a property interest was established by the plaintiff having tenure.

20. The applicable provision of the Faculty Handbook is as follows:

(Cont'd)

is emphasized by the fact that "a claim of entitlement must be decided by reference to state law," *Bishop v. Wood*, 426 U.S. 341, 344 (1976), and "Alabama law requires no justification or reason for not renewing the contract of an untenured teacher."[21]

His remaining argument reasons that because the Faculty Handbook says the University's "wide latitude" will be "consistent with academic freedom and due process," Fourteenth Amendment due process was conferred on him.[22]

(Cont'd)

> Because all probationary contracts to the ranked faculty at Troy State University in Montgomery are made with the understanding that both the University and the appointee will engage in a period of mutual evaluation prior to establishing a continuous association, a severance prerogative rests with both parties.
>
> The term nonreappointment means that the University has decided not to renew appointment of a nontenured faculty member. A major responsibility of TSUM is to recruit and retain the best qualified faculty within its means; therefore, wide latitude, consistent with academic freedom and due process, is accorded the Dean and the Vice-President for Academic Affairs in meeting this responsibility.

21. *Abston v. Woodward*, 437 So. 2d 1261, 1264 (Ala. 1983). *See also Johnson v. Cain*, 430 F. Supp. 518, 519 (N.D. Ala. 1977) ("the plaintiff was not entitled to be given any reason for the nonrenewal of his contract, and was not entitled to a hearing on the action taken.").

22. The University's position is that it means compliance with the procedural steps for nonrenewal, which were without dispute followed. *Lovelace*, 793 F.2d at 1122 (provision for "justification" of recommendations for renewal or nonrenewal are not a relinquishment of the university's normal discretion but rather "simply proceduralized

(Cont'd)

The conclusive answer is the established principle that property interests protected by the due process clause cannot be created from procedural provisions. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) is explicit on the subject:

> The point is straightforward: the Due Process Clause provides that certain substantive rights — life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty.

So it is that here, as in *Bunger v. University of Oklahoma Board of Regents*, 95 F.3d 987, 990-991 (10th Cir. 1996), Boyett "attempts to construct a property interest out of procedural timber, an undertaking which the Supreme Court warned against in *Cleveland Board of Education v. Loudermill* . . . ." *See also Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 422 (1st Cir. 1986) (by specifying criteria, "a university does not thereby set objective criteria, constricting its traditional discretion or transforming a largely judgmental decisional process into an automatic right to, or property interest in, tenure."); *Villanova v. Abrams*, 972 F.2d 792, 798 (7th Cir. 1992) ("the persistent fallacy that procedural requirements create substantive entitlements, although the Supreme Court and this court keep insisting they don't."); *Batra v. Board of Regents of University of Nebraska*, 79 F.3d 717, 720 (8th Cir.

(Cont'd)
the information gathering process . . . ."); *Colburn*, 973 F.2d at 589 ("A property interest is not established by general statements in handbooks, appointment documents or elsewhere that an employee will be judged on some criteria.").

1996) ("The University's alleged failure to follow its own procedural rules and regulations did not, without more, give rise to a protected liberty or property interest.").

The Eleventh Circuit was therefore standing on solid *Loudermill* precedent in rejecting Boyett's contention because he failed to establish a property right. App. 4a.

His effort to depart from this principle by relying on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) takes him nowhere. It had odd facts, resulting in the observation by Justices Powell and Rehnquist that "this is a case that should be decided narrowly on its unusual facts." 455 U.S. at 443 (concurring opinion). Moreover, the plaintiff there had a constitutionally protected property interest, 455 U.S. at 430, while Boyett in contrast did not. His reliance on *Logan* thus begs the question.

CONCLUSION

Boyett has received ample analysis of his claims by the District Court and the Court of Appeals. His petition for still another round in the Supreme Court should be denied.

Respectfully submitted,

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No. 98-699

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOSEPH E. BOYETT,
Petitioner,

v.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE WRIT

At page 15 of their brief in opposition, the Respondents discount the applicability of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) by saying that "the plaintiff there had a constitutionally protected property interest, 455 U.S. at 430, while Boyett in contrast did not."

The Respondent's argument is disingenuous, because the property interest identified in *Logan* and the property

interest claimed by Boyett are essentially the same—the right of access to state-established administrative adjudicatory machinery.

This case presents a type of convergence of constitutional issues that perhaps is not present in most cases.

First, this Court has held conclusively that government may not penalize one for the exercise of constitutional freedoms, because to do so would "allow the government to 'produce a result which [it] could not command directly.' " *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quoting from *Speiser v. Randall*, 357 U.S. 513, 526 [1958]). In *Perry*, the Court also noted that "[s]uch interference with constitutional rights is impermissible." *Id.* The provisions of the right to petition for redress contained in the First Amendment are frequently implemented by governmental agencies through their grievance procedures. The teaching of *Logan* is that, once these procedures are established, the right of access to them becomes a property right protected by the Fourteenth Amendment. When one accesses that procedure, even though the complaint involves only personal matters, and perhaps not matters of public concern, punishment therefore simply should not be permitted unless the grievant somehow misuses the procedure. Thus, a violation of the Fourteenth Amendment has occurred.

Second, encouraging a government employee to utilize grievance procedures, and then punishing him for doing so, produces an unconscionable result. As the Petitioner has previously pointed out, such a practice borders on the absurd and a similar practice was condemned in *Heckler v. Community Health Service*, 467 U.S. 51, 61 n. 13 (1984) by quoting from *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government.") If the right to petition

is to have any meaning, punishment for its exercise must be prohibited.

Respectfully submitted,

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